Supreme Court
FILED
061558 2007
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED
STATES

RICHARD VARN

Petitioner

vs.

DEPARTMENT OF THE ARMY
FRANCIS J. HARVEY
SECRETARY OF THE UNITED STATES
ARMY

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals for
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD VARN
1717 Calista Circle
Fayetteville, North Carolina 28304
My Telephone Number: 910-426-1274
My Cell Phone Number: 910-257-3165

QUESTIONS PRESENTED FOR REVIEW

1. Whether Court of Appeals, Appendix A and District Court, Appendix B, erred and violated 29 C.F.R. 1614.109, and Petitioner's due process rights to a fair and impartial administrative hearing, Amendment V, U.S. Constitution, when they considered as evidence against Petitioner the Equal Employment Opportunity Commission's Administrative Judge's decision, Appendix C, against him, wherein said Judge refused to grant Petitioner an Administrative Hearing, where he could call witnesses and cross-exam the witnesses against him, even though, he, Appellant had requested such an administrative hearing.

2. Whether Court of Appeals and District Court erred and violated 5 USC Section 7703(c) and Petitioner's due process rights to a fair and impartial administrative hearing, Amendment V, U.S. Constitution, when they considered as evidence against said Petitioner the Merit Systems Protection Board Administrative Judge's decision against him, Appendix D, wherein said Judge refused to grant Petitioner's request

therein to call witnesses in his behalf, at his said Administrative Hearing, Appendix E & F.

3. Whether District Court and Court of Appeals erred and violated 5 U.S.C. Section 7703(c)(2) and Petitioner's due process right to a fair and impartial administrative hearing, when they considered as evidence against said Petitioner the Merit Systems Protection Board Administrative Judge's decision against, wherein said Judge refused Petitioner's Request for Administrative Judge to consider the DOD Fact Finding Commissioner's Report and the sworn Statements therein, Appendix G.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: RICHARD VARN
1717 Calista Circle
Fayetteville, North Carolina
28304
Phone: 910-426-1274
Cell : 910-257-3165

Respondent: DEPARTMENT OF
THE ARMY
Secretary of the
United States Army
Francis J. Harvey
C/o Lora M. Taylor
U.S. Department of Justice
310 New Bern Avenue
Raleigh, North Carolina 27601

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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IN THE

SUPREME COURT OF THE

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____;
or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____;

or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 28, 2006.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V, United States Constitution

   "No person … shall be deprived of life, liberty, or property, without due process of law …"

2. 29 C.F.R. Section 1614.109

   "(a) When a Complainant requests a hearing, the Commission shall appoint an Administrative Judge to conduct a hearing in accordance with the hearing …"

3. 5 U.S.C. 7703(c)

   Since case is a "mixed" case, the District Court and Court of Appeals would review and hold unlawful any Agency's action, findings or conclusions found to be (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) obtained without procedures required by law, rule or regulation having been followed, or (3) un-supported by substantial evidence…"

STATEMENT OF THE CASE

1. My EEO Claims were assigned to an EEO Administrative Judge, who did not have any witness appear or take sworn testimony on any of the issues raised by myself. This was and is contrary to 29 C.E.R. 1614.109, which specifically states that when a Complainant requests a hearing then one should be granted, unless there are no material issues of fact, etc. In my case, where there was such a material issue of facts as set forth in my appeal to the U.S. Court of Appeals, Appendix A and the District Court, Appendix B, substantially erred to my prejudice in not sending the EEO case back to the EEO for a hearing thereon. Further by not granting myself a hearing where I could present my witnesses and cross-examine the Army's witnesses this prevented me from developing the facts necessary to prove my case of wrongful discrimination against the Army.

2. I had been a Civil Service Member of the Department of United States Army since September 5, 1994, as a GS-12 Senior Auditor. Prior to this time I had began my Civil Service back in October, 1977, Energy Research & Development Administration,

and continued to then work for the Federal Government until I was terminated from my Army employment on August 29, 2003, allegedly on the basis of my making unfounded accusations against certain employees also working for the Department of Army. I then filed both an EEO type hostile work environment complaint alleging discrimination against me because of my race, Black, sex, Male and age 49. The EEO Administrative Judge involved then issued a Summary Judgment decision therein, Appendix C, on the basis that there was no genuine issue of material fact under 29 C.F.R. Section 1614.109, even thou I had specifically requested a hearing thereon and had argued that it was essential to my case, that I be given opportunity to present my witnesses and evidence on the material issue of fact in the case, and further that I should have an opportunity to cross-examine those witnesses against me. This denial of my right to a hearing was further in error for it also violated my right under the 5th Amendment to the U.S. Constitution, wherein it is set forth that such due process, where job termination is the issue, requires myself to be given a fair and impartial hearing in the matter.

The EEO Decision without any hearing thereon, even though there were material issues of fact, and where the

credibility of the Government witnesses was seriously in doubt, was then subsequently wrongfully referred to by the District Court, Appendix B, and given substantial credibility and weight, in denying my claims, even when it then supposedly considered my EEO Discrimination Complaint de novo. This non-hearing was then even more contradictory in nature, where even the Court of Appeals, Appendix A, then perfunctionally sustained the District Court's opinion, without any further review of the matter.

Similarly, and at the same time, that I had appealed my termination on the basis of a hostile work environment, i.e., race and sex and age discrimination. I had also appealed my termination to the Merit Systems Protection Board, on August 28, 2003, on the basis that my removal was not warranted by the evidence and that it was in retaliation for my having filed a Complaint against one of my supervisors, a Mr. William Jenkins. Here, and although there was a hearing, the Merit Systems Protection Board Administrative Judge, Appendix D, steadfastly refused to call any of the witnesses that I had proposed, even though I had given good reason to call them. The Administrative Judge would only call witnesses who were going to be favorable to

the Army. In fact, and even though I had specifically requested numerous witnesses, Appendix E, all witnesses on my list were summarily denied by the Administrative Judge, Appendix F. Likewise, it was this same Administrative Judge who took into consideration various sworn statements submitted by the U.S. Army against me, but then refused to review the sworn statements on my behalf, as requested by myself, and which went to issues of fact, and which were in the Department of Defense, Office of Complaints Investigation, Fact Finding Conference conducted on February 26-27, and March 20, 2003, by the U.S. Army Audit Agency, Appendix G.

As a result of this wrongful denial, the Judge ruled against me, on issues of fact because the Judge wouldn't let me call my character witnesses and other witnesses that were favorable to me. It was my belief that these witnesses would be favorable to me, since they had refused to sign statements against me, when management had asked them to. Those witnesses, however, were not wanting to give any favorable specifics about my case to me and before the hearing, unless they were summoned into the MSPB Hearing, for none of them had wanted their supervisors to think bad about them, and that

they were going to volunteer testimony, which would later harm them in their careers.

I appealed this decision to the Merit Systems Protection Board in Washington, but they also ruled against me. I filed my Complaint in Federal District Court on April 4, 2005, and on May 27, 2005, the EEOC dismissed my Complaint Appeal of the EEO Decision because of my Federal Court filing.

The U.S. District Court then adopted and considered the MSPB Initial Decision as controlling, because it stated, that such decision would be upheld, because I had not been able to show that such was arbitrary, capricious, or an abuse of discretion or contrary to such rule, which I had been prevented from doing by this same Administrative Judge.

I therefore believe I was wronged in three different ways herein, by the EEO Decision which precluded me from having any hearing at all as to my discrimination/hostile work environment complaint, and the MSPB Hearing, which was so held without any of my witnesses at all which in effect was to effectively amount to my having no hearing at all, and all of

which precluded me from being able to present sufficient facts as to my complaints, and to challenge, the credibility of U.S. Army witnesses against me which violated not only the Code of Federal Regulations, but my due process rights under the 5th Amendment to have a fair and impartial administrative hearing both as to the MSPB and EEOC decisions against me.

REASONS FOR GRANTING THE PETITION

The fundamental requirement of due process of law is the opportunity to be heard, ***Grannis v. Ordean***, 234 U.S. 385, 394, 58L Ed 1363, 1369, 34 S. Ct. 779 (1914), with such hearings to be held in a reasonable manner, ***Armstrong v. Manzo***,380 U.S. 545, 552 14 L Ed. 2d 62, 66, 855 Ct. 1190 (1965). Therefore, it is said that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses, ***Goldberg v. John Kelly***, et.al. 397 U.S. 254, 300, 25 L Ed 2d 287, 90 S Ct. 1011 (1970).

Here in my case, there was no hearing held at all in my EEO Case, even though I had requested one, and there involved disputed issues of material fact, with substantial credibility issues being raised. Still I was not granted an Administrative Hearing, which to me constitutes a violation of my due process rights to have a fair and impartial hearing, since I was being terminated from civil service employment after 26 years of employment, and even though previously I had a very good overall

record of accomplishment and devotion to the Federal Government, with no prior disciplinary action against me. This to me does constitute continuing bias and prejudice against me, one further example being that even while the EEO Administrative Judge found that the record showed sufficient evidence to support a prima facie case of reprisal the fact that the Agency presented evidence that I was given a letter of warning because of my disruptive behavior was such that the Agency's burden had been met, Page 8, Appendix C, EEO Decision. If, however, I had been able to have an Administrative Hearing I could have cross-examined the Agency's witnesses, so as to attack their credibility. I could have also called other witnesses on my behalf to address these issues but what the Administrative Judge by its decision did however, was to take away my "due process" right to have such a hearing on such a material issues of fact.

Further, it is respectfully submitted that this failure to grant me a hearing was also in violation of 29 C.F.R. 1614.109 which requires a hearing to be held where there are such disputed issues of fact and witness credibility. As a result of such denial of my Administrative Hearing right I was not in a position where I could produce

the facts necessary to prove my case and disprove the Army's alleged facts.

Likewise, it is respectfully submitted that when the Merit Systems Protection Board Administrative Judge, refused to permit myself to call any of the witnesses named by myself, see Appendix E & F, either as to character or on the facts, such in effect amounted to a "no hearing" at all for myself, as to the MSPB termination, and as such also deprived me of my due process rights to have a fair and impartial hearing, on all aspects of my termination from Government employment, which then took away from me all my retirement pay, insurance, medical, etc., benefits, which would have accrued to myself, if I had been able to retire as an ordinary Civil Service employee after 26 years of service.

Further it is respectfully submitted that not only were my due process rights under the 5th Amendment to the Constitution violated but also my rights to a fair and impartial hearing under 5 U.S.C. Section 7703 (c) for there is no way that the MSPB Administrative Judge could conduct a "thorough and exact review" of my claims, see Page 9, District Court Opinion, if she would not let me call any witnesses to

support my claim and to present facts sufficient to prove my case and sufficient to overcome any Motions for Summary Judgment against me.

Therefore, in my present case, where the District Court and the Court of Appeals found that the MSPB Administrative Decision was a "valid" one, and one of controlling nature, such was manifest and substantial error, and thus such MSPB Case should be reversed and remanded for appropriate MSPB Hearing to be held thereon. My prior termination from Federal Government employment should be set aside, and that I be granted back and front pay, with no loss of benefits to me, and damages for the pain and suffering which has been caused to myself and attorney's fees as provided by law, and as specifically set forth in my appeal to the U.S. Federal Court, i.e., restore leave balance, restore sick leave balance and ensure appropriate monies and earned work hours as credit for retirement purposes, and promotion to Auditor 511-13, Step 10.

Likewise where there was substantial error, by the not granting me of an Administrative Hearing in regard to my EEO claim of discrimination, such also violates my due process rights under the 5th

Amendment, and requires a setting aside that part of the District Court Decision which affirmed the granting of Summary Judgment on my EEO Claim. Again, the remedy sought here is the same, the reversing and remanding of the case for an appropriate EEO Hearing to be held, but with also the Court now setting aside the wrongful termination of myself, and the subsequent loss of retirement, medical benefits to myself, with the Department of Army in both circumstances being required to now pay me back pay, compensatory damages, and past attorney's fees for the wrongs which have been done to myself, all as set forth supra.

Consistent with the foregoing, and where the EEOC and the MSPB Decisions were thus wrongly considered to be most substantial evidence against me by both the District Court and the Court of Appeals, the District Court and the Court of Appeal's decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, as set forth supra, and further should be granted for it affords the Court an opportunity to specifically describe the circumstances under which an Administrative Judge, EEOC or MSPB, can take away an individual Federal Government Employee's due process and statutory right to a fair and impartial Administrative Hearing, where such Government Employees are being terminated from their employment.

Dated this 21st day of May, 2007.

Respectfully Submitted,

RICHARD VARN
1717 Calista Circle
Fayetteville, North Carolina 28304
Phone: 910-426-1274
Cell : 910-257-3165

Appendix A

JUDGMENT

FILED: December 28, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 06-1492
5:05-cv-00226-BO

RICHARD VARN
Plaintiff – Appellant

v.

DEPARTMENT OF THE ARMY;
FRANCIS J. HARVEY,
Secretary of the United States Army
Defendants – Appellees

Appeal from the United States
District Court for the Eastern District of
North Carolina at Raleigh

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No . 06-1492

RICHARD VARN
Plaintiff – Appellant

versus

DEPARTMENT OF THE ARMY;
FRANCIS J. HARVEY,
Secretary of the United States Army,
Defendants – Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:05-cv-00226-BO)

Submitted: December 21, 2006
Decided : December 28, 2006

Before NIEMEYER, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Richard Varn, Appellant Pro Se.
Lora M. Taylor, OFFICE OF THE UNITED STATES ATTORNEY,
Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Varn appeals from the district court's order granting summary judgment in favor of the Secretary of the Army on his employment discrimination complaint. Our review of the record and the district court's opinion discloses no reversible error. Accordingly, we affirm for the reasons stated by the district Court. Varn v. Department of the Army, Case No. 5:05-cv-00226-BO (E.D.N.C. Mar. 31, 2006). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court

and argument would not aid the decisional process.

AFFIRMED

Appendix B

Other Orders/Judgments

5:05-cv-00226-BO

Varn v. Department of Army, et al

U. S. District Court

Eastern District of North Carolina

Notice of Electronic filing

The following transaction was received from Deputy Clerk, BRB entered on 3/31/2006 at 5:44 PM EST and filed on 3/31/2006

Case Name:
Varn v. Department of Army, et al
Case Number: 5:05-cv-226
Filer:
WARNING: CASE CLOSED on 3/31/2006
Document Number: 16

Docket Text:
JUDGMENT that the Plaintiff cannot establish a prima facie case on his claims of hostile work environment, disparate

treatment or retaliation, and because no question of material fact has been presented, the Court finds that Defendant is entitled to summary judgment on all of Plaintiff's claims. The Court further notes that Defendant's rationale for removing Plaintiff is fully supported by the MSPB decision, and Plaintiff has not shown that it was arbitrary and capricious, obtained without procedures required by law, or unsupported by substantial evidence. Accordingly, Defendant's Motion for Summary Judgment is GRANTED. This matter is dismissed in its entirety. Signed by Michael Brooks, Acting Clerk on 3/31/06. (Deputy Clerk, BRB)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1114528487
[Date=3/31/2006] [File number=456160-0]
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a364a110655523aa52a320aealfl0eb839f942
2c12e7fbc9ba9c1d7e0c41]]

5:05-cv-226 Notice will be electronically mailed to:

Lora M. Taylor lora.taylor@usdoj.gov, usance.ecfcivil2@usdoj.gov

5:05-cv-226 Notice will be delivered by other means to:

Hmprey S. Cummings
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1230 West Morehead Street
Suite 404
Charlotte, NC 28208-5210

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03/31/2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

RICHARD VARN

v.

FRANCIS J. HARVEY,
Secretary of the Army

No. 5:05-CV-226-BO

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff cannot establish a prima facie case on his claims of hostile work environment, disparate treatment or retaliation, and because no question of material fact has been presented,

the Court finds that Defendant is entitled to summary judgment on all of Plaintiff's claims. The Court further notes that Defendant's rationale for removing Plaintiff is fully supported by the MSPB decision and Plaintiff has not shown that it was arbitrary and capricious, obtained without procedures required by law, or unsupported by substantial evidence. Accordingly, Defendant's Motion for Summary Judgment is GRANTED. This matter is dismissed in its entirety. (BOYLE, J)

This Judgment Filed and Entered on March 31, 2006, and Copies To:

Humphrey S. Cummings
The Cummings Law Firm, PA
1230 West Morehead Street
Suite 404
Charlotte, NC 28208-5210

Lora M. Taylor
US Dept. Of Justice
310 New Bern Avenue
Raleigh, NC 27601

March 31, 2006 /s/ Michael Brooks,
Acting Clerk of Court

Orders on Motions

5:05-cv-00226-BO

Varn v. Department of Army, et al

U. S. District Court

Eastern District of North Carolina

Notice of Electronic filing

The following transaction was received from Deputy Clerk, BRB entered on 3/31/2006 at 5:32 PM EST and filed on 3/31/2006

Case Name:
Varn v. Department of Army, et al
Case Number: 5:05-cv-226
Filer:
Document Number: 15

Docket Text:
ORDER granting [4] Motion to Dismiss, granting [4] Motion for Summary Judgment. Signed by Judge Terrence W. Boyle on 3/31/06. (Deputy Clerk, BRB)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1114528487 [Date=3/31/2006] [File number=456153-0] [13ccae625251bd3c19ba045453e7albba9e7f lf54a0ad4fd33dd2137c3d000cd9e4983a06d 3d6b647fb171cf6feb2245774baa315ea4771 41bad124057fd30ba]]

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The Cummings Law Firm, P.A.
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03/31/2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

RICHARD VARN
Plaintiff,
v.

FRANCIS J. HARVEY,
Secretary of the Army
Defendant.

No. 5:05-CV-226-BO(1)

ORDER

This matter is before the Court on Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Plaintiff responded, and a hearing was held in Elizabeth City on March 14, 2006. For the reasons discussed below, Defendant's Motion for Summary Judgment is GRANTED.

BACKGROUND

On April 4, 2005, Plaintiff Richard Varn filed his civil complaint against Defendant, the Secretary of the Army, alleging that Defendant had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-16, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 20 U.S.C. Section 621 *et seq.* Specifically, Plaintiff contends that Defendant created a hostile work environment, discriminated against him on the basis of his race, sex, and age, and retaliated against him for engaging in protected Equal Employment Opportunity ("EEO") activity, culminating in his removal for "conduct unbecoming a federal employee."

Plaintiff, who is fifty-three years old and an African-American male, was employed as a GS-12 Auditor at the Fort Bragg Field Office of the U.S. Army Audit Agency ("AAA") from September 1994 until August 2003. While with the AAA, he initially served on a developmental assignment with the Office of the Assistant Secretary for Financial Management and Comptroller from July 1999 until September

2000. He then worked on the Intelligence and Security Team until April 2001, when he was transferred to the Logistics Team. Plaintiff was a member of the Logistics Team when he was removed by Defendant in August 2003.[1]

Beginning in January 2001, Plaintiff began to have concerns about coworkers on the Intelligence and Security Team. Specifically, he believed that two of his coworkers were making negative comments about his auditing abilities and his family. On January 17, 2001, a meeting was called by Robert Stronger, the Auditor in Charge, to address Plaintiff's concerns. At this meeting, both of the charged coworkers denied Plaintiff's allegations. When asked to explain what they had done, Plaintiff could not provide any specific examples. Thomas Stanton, the Program Director, later met with Plaintiff individually to discuss his allegations. He explained to Plaintiff that his allegations had caused a complete breakdown in team communication and that three of Plaintiff's coworkers had requested

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[1]In his recitation of the facts, Plaintiff points out that he was the "oldest non-supervisory auditor" as well as the "only non-supervisory black male" throughout his tenure at the AAA's Fort Bragg Field Office.

reassignment so they would no longer have to work with him. Mr. Stanton informed Plaintiff that he was going to ask Thomas Druzgal, the Deputy Auditor General, to reassign Plaintiff to another team. Accordingly, Plaintiff was reassigned to the Logistics Team in April 2001.

This reassignment did not put an end to Plaintiff's complaints about his coworkers. In March 2002, Plaintiff informed William Jenkins, one of his new supervisors, that his coworker, Anita Paul, was being disrespectful and "mocking" him.[2] These allegations were investigated by Rodney Rocha, who concluded that Ms. Paul did not intentionally say or do anything to disrespect Plaintiff, and that Plaintiff may have misinterpreted her actions.[3] Then, in July 2002, Plaintiff made several allegations against his supervisors and other employees. For example, Plaintiff accused a coworker of talking to his pastor

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[2]As the Auditor in Charge of the Logistics Team, Mr. Jenkins became Plaintiff's first line supervisor and annual rater.

[3]Rodney Rocha, Audit Manager for the auditors assigned to the Logistics Team at the Fort Bragg Field Office, became Plaintiff's second line supervisor and senior rater.

about him, and alleged that Mr. Jenkins had contacted his bank about Plaintiff's car loan. However, when Mr. Rocha met with Plaintiff to discuss the allegations, Plaintiff again could not provide any evidence to support his claims. As a result, Mr. Rocha determined that "the harassment exists totally in [Plaintiff's] mind"[4]

After an independent investigation into the allegations yielded similar results, Mr. Rocha issued Plaintiff a warning letter on December 2, 2002 concerning Plaintiff's behavior.[5] In this letter, Mr. Rocha stated

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[4]Mr. Rocha also met with Plaintiff in August 2002 to discuss his allegations as well as Plaintiff's work. Upon reviewing his work, Mr. Rocha had discovered the Plaintiff had not adequately completed an assignment, and so he gave Plaintiff specific instructions as to what needed to be done. According to Defendant, Plaintiff acknowledged the problem and assured him it would be remedied. With respect to the issue of his work performance, Plaintiff's claims he never received a performance improvement plan ("PIP") or mid-year evaluation, which he contends employees performing "sub-par" are entitled to receive. However, the Court notes that Plaintiff was removed for conduct unbecoming a federal employee, not poor performance.

[5] This investigation was conducted by Fred Adkins, another Program Director, in September 2002. Based upon his interviews with Plaintiff as well as his coworkers and supervisor, Mr. Adkins determined that the allegations were unfounded.

that Plaintiff's behavior was "causing a disruption in the workplace" that could not be allowed to continue. In particular, Mr. Rocha noted Plaintiff's unsubstantiated allegations against numerous employees, his vocal outburst during a discussion with a supervisor which was alarming to his coworkers, and Mr. Rocha's belief that Plaintiff's behavior was negatively affecting his work, as suggested by the "needs improvement" rating he received for the period ending October 31, 2002.[6] Mr. Rocha

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One of Plaintiff's coworkers also informed Mr. Adkins that she did not want to work with Plaintiff and that others felt uncomfortable around him and were actually afraid of him.

[6] The discussion to which Mr. Rocha specifically referred was between Plaintiff and supervisor Ted McNeill over the use of a General Services Administration ("GSA") vehicle, which led to a building evacuation because Mr. McNeill feared Plaintiff would assault his coworkers. The MSPB ALJ who heard evidence about this incident found Plaintiff's denial that he was disruptive or that anything occurred less credible than Mr. McNeill's detailed explanation of the incident. According to the MSPB ALJ, Mr. McNeill testified that Plaintiff became very agitated during the discussion and raised his voice in a confrontational manner. Therefore, when he saw Plaintiff go to his car to retrieve something, he was afraid and decided to dismiss the employees for the rest of the day. Plaintiff maintains that all matters involving him were "blown out of proportion, demonized, and

also urged Plaintiff to seek assistance from Fort Bragg's Employee Assistance Program ("EAP") or private assistance, and invited him to provide medical evidence of any medical condition that might be affecting his performance or condition.[7]

On February 4, 2003, Belinda Tiner received a call from an officer at the John F. Kennedy Special Warfare Center and School ("the Center"), which is also located at Fort Bragg, complaining about Plaintiff.[8] Apparently, Plaintiff had appeared at the Center the day before and asked to see Carmel Larry's immediate supervisor because he believed Ms. Larry and her husband were tampering with his personal mail.[9] According to the officer, Plaintiff

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made the subject of an agency wide gossip or smear campaign", as demonstrated by this sequence of events.

[7]Plaintiff contends that under applicable guidelines, Mr. Rocha could have ordered Plaintiff to undergo a medical examination but did not. However, the Court does not find this fact probative of any issue relevant to Plaintiff's case.

[8]Ms. Tiner was Plaintiff's second line supervisor when he was on the Intelligence and Security Team. The officer who contacted her was Major John E.B. Stewart.

[9] Ms. Larry, a civilian employee at the Center, is Plaintiff's next-door neighbor at his off-

was disruptive, and despite being told to leave, insisted on calling another officer at the Center to complain about Ms. Larry.[10] After learning about this incident, Mr. Rocha promptly placed Plaintiff on Administrative Leave. In doing so, he noted that Plaintiff's behavior at the Center was especially egregious because it involved one of AAA's military clients and brought discredit to the agency and his fellow auditors. The leave was not considered adverse since it did not affect Plaintiff's pay, position, or status as a federal employee.

Soon thereafter, by notice dated July 1, 2003, Mr. Rocha proposed Plaintiff's removal for "conduct unbecoming a federal employee." The proposal was based on the incidents described in the warning letter he issued to Plaintiff, and the incident at the Center. Two months later, on August 25,

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post residence. Plaintiff contends he asked to see Ms. Larry's supervisor because "he felt it was a peaceful way of resolving the matter," and also "the best way to resolve it as quick as possible."

[10]Plaintiff maintains he was not disruptive, and that he only called the second officer because he believed his needs were not properly being addressed. The MSPB ALJ noted that in testifying about this incident, Plaintiff "appeared to believe now that it was a mistake to go to Ms. Larry's workplace."

2003, James Andrews, the Program Director, issued a decision to remove Plaintiff based upon Mr. Rocha's recommendation. Plaintiff was officially removed from his position for "conduct unbecoming a federal employee" on August 29, 2003.

Prior to his removal, Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on September 20, 2002.[11] In his EEO complaint, which he subsequently amended three times, Plaintiff claimed he had been the victim of unlawful employment discrimination by Defendant because of his race, sex, and age.[12] Specifically, Plaintiff alleged that his supervisors had subjected him to a hostile and intimidating work environment, and listed a number of factual

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[11]Plaintiff initially filed an informal complaint with Defendant on August 8, 2002. As part of its internal investigation, Defendant's Office of Complaint Investigations ("OCI") conducted an investigative hearing, which led Defendant to conclude that Plaintiff's supervisors had neither subjected him to a hostile work environment nor discriminated against him.

[12]Plaintiff amended his complaint on October 25, 2002, December 2, 2002, and February 10, 2003.

allegations to support his claim.[13] He also claimed he was treated to disparate treatment, citing Defendant's alleged disapproval of employees who did not participate in office social events and his transfer to the Logistics Team.

On March 5, 2004, an Administrative Law Judge ("ADJ") for the EEOC issued a decision finding that Plaintiff had not proven by a preponderance of the evidence that he was the victim of wrongful discrimination. The EEOC ALJ found that Plaintiff's allegations of hostile work environment were unsubstantiated, and further determined that he could not establish a *prima case* of disparate treatment. The

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[13] These allegations primarily involved Mr. Jenkins and Ms. Tiner. Plaintiff claimed, for example, that Mr. Jenkins had attempted to find out what he was doing while on vacation in Mexico and Barbados in July 2002, that Mr. Jenkins went through his desk and personal carrying case to obtain personal information about him, that Mr. Jenkins had contacted his bank about Plaintiff's current loan payment, that Ms. Tiner prevented him from excelling at his auditing job by assigning him to administrative duties, that both Ms. Tiner and Mr. Jenkins degraded him in front of other team members and command personnel, that they spoke to his neighbor concerning events that happened in his neighborhood, and that they generally attempted to destroy his personal and professional reputation.

EEOC ALJ reached this conclusion because Plaintiff had not established that he had been treated less favorably than similarly situated employees outside his protected group, Defendant had articulated a legitimate, non-discriminatory reason for removing Plaintiff, and Plaintiff had not shown that Defendant's reason for the removal was pretextual.

Plaintiff also challenged his removal through an appeal to the Merit Systems Protection Board ("MSPB"), which he filed on August 28, 2003. A hearing was held, and the MSPB ALJ sustained Defendant's decision to remove Plaintiff, finding that Plaintiff had engaged in inappropriate behavior and the decision was "a responsible management action." The MSPB ALJ further determined that Plaintiff had not established a *prima facie* case of discrimination based on his race, sex, or age, or for retaliation. On March 9, 2005, the MSPB Board issued a decision denying Plaintiff's petition for review, and upholding the MSPB ALJ's initial decision.

Plaintiff filed his civil complaint in this Court on August 4, 2005.[14] Defendant

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[14] On May 27, 2005, the EEOC dismissed Plaintiff's appeal of the EEOC ALJ's decision because Plaintiff had instituted this action.

subsequently moved to dismiss the complaint, or in the alternative, to enter summary judgment in Defendant's favor. As agreed upon by the parties at the March 14, 2006 hearing, the Court will properly treat Defendant's motion as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[15] *See* Fed. R. Civ. P. 12(b)(6) (providing that a motion to dismiss under Rule 12(b)(6) can be converted into and disposed of as a motion for summary judgment if matters outside the pleading are presented to and not

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[15]A court may grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party bears the initial burden to show the court that there is no genuine issue concerning any material fact. *See Celotex*, 477 U.S. at 325. In order to survive the motion, the non-moving party must then show that there is "evidence from which a jury might return a verdict in his favor." *Anderson*, 477 U.S. at 257. The court must accept all of the non-moving party's evidence as true and must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. *See id*, at 255.

excluded by the court, and that parties are "given reasonable opportunity to present all material pertinent to such a motion").

DISCUSSION

A district court has jurisdiction to review "mixed cases," which involve both Title VII discrimination claims and civil service claims appealed from the MSPB, under 5 U.S.C. Section 7703. See *Johnson v. Burnley*, 887 F. 2d 471, 474 (4th Cir. 1989); *Rana v. United States*, 812 F. 2d 887, 888 (4th Cir. 1987). In such cases, the court reviews the Title VII claims and the claims appealed from the MSPB separately. With regard to the MSPB claims, the court "must review the record" and set aside any agency findings or conclusions that are "arbitrary and capricious," "obtained without procedures required by law," or "unsupported by substantial evidence." 5 U.S.C. Section 7703(c)(1)-(3). However, with regard to claims of discrimination brought under Title VII, the court conducts a *de novo* review, utilizing the *McDonnell Douglas* framework if there are no allegations of direct discrimination. Because this case qualifies as a "mixed case," the Court will accordingly treat Plaintiff's retaliation and discrimination

claims separately, applying the appropriate standard of review to each type of claim.

I. *Plaintiff's Retaliation Claim*

Summary judgment is proper when there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P.56(e). In order to avoid summary judgment for Defendant on his retaliation claim, Plaintiff must first establish a *prima facie* case of retaliation.[16] Therefore, he must offer evidence from which a reasonable jury could conclude that (1) he engaged in protected activity; (2) his employer took adverse action against him; and (3) a causal connection exists between

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[16] Once a plaintiff makes out a *prima facie* case of retaliation, the burden of persuasion then shifts to his employer, who must offer a legitimate, non-discriminatory reason for the adverse employment action. *See Williams v. Cerberonics, Inc.*, 871 F. 2d 452, 457 (4th Cir. 1989). When the employer produces such a reason, the burden shifts back to the Plaintiff, who must produce evidence that the employer's proffered reason for the adverse employment action was merely a pretext for intentional discrimination. *See id.* If the Plaintiff presents evidence to create a material issue of fact on each element of the *prima facie* case and on the issue of pretext and discrimination, then summary judgment is inappropriate.

the protected activity and the adverse action.[17] *See Price v. Thompson*, 380 F. 3d 209, 212, (4th Cir. 2004).

Viewing the evidence in the light most favorable to Plaintiff, he has failed to present sufficient evidence of a *prima facie* case of retaliation. Specifically, Plaintiff claims that he was retaliated against by Defendant for filing his EEO complaints when he was issued a "needs improvement" rating on his performance appraisal, when he was issued a warning letter for causing disturbances in the workplace, when he was placed on administrative leave, and when he was removed from employment. However, Plaintiff has failed to establish a causal relationship between any of these events, which he claims were "clearly adverse employment consequences," and the filing of his EEO complaints. He has produced no evidence that Defendant made these employment decisions in retaliation for his protected activity. Rather, Plaintiff only offers his subjective belief that he was retaliated against by Defendant, which is insufficient to defeat a summary judgment motion. *See Goldberg v. B. Green & Co.*,

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[17]Defendant acknowledges that Plaintiff's EEO filings constitute protected activity. See 42 U.S.C. Section 2000e-3(a).

836 F. 2d 845, 848 (4th Cir. 1988) (finding that plaintiff's own opinions and conclusory allegations do not have sufficient "probative force to reflect a genuine issue of material fact").

Furthermore, the MSPB ALJ who initially heard Plaintiff's retaliation claim concluded that Plaintiff could not establish "a nexus between Mr. Rocha's slight motive to retaliate and the proposed removal," and that Mr. Andrews, who actually issued the decision to remove Plaintiff, had no motive to retaliate against him. In fact, after carefully assessing "the gravity of the misconduct as it appeared to Mr. Rocha when he proposed removal," the MSPB ALJ determined that the Defendant's decision to remove Plaintiff was "a responsible management action" which "had a sound basis," namely Plaintiff's increasingly erratic behavior. Plaintiff has failed to show that the MSPB ALJ' decision was arbitrary and capricious, obtained without procedures required by law, or unsupported by substantial evidence. Moreover, a review of the record shows that the MSPB ALJ conducted a thorough and exacting review of his claims. She considered, for example, the sworn statements of eleven witnesses, including four of Plaintiff's co-workers, all of whom she found to be credible. Also,

Plaintiff admitted during his testimony at the MSPB hearing that he had no evidence to support his allegations, but simply felt they were true.

Accordingly, the MSPB ALJ's finding that Defendant did not retaliate against Plaintiff is binding, and the Court finds that Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

II. *Plaintiff's Discrimination Claims*

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Section 2000e-2(a). The ADEA similarly bans employment discrimination on the basis of age. The United States Supreme Court first articulated the now-familiar burden-shifting framework for analyzing employment discrimination cases in *McDonnell Douglas Corp. v. Green*, 411

U.S. 792 (1973).[18] *See E.E.O.C. v. Warfield-Rohr Casket Co., Inc.*, 364 D. 3d 160, 163 (4th Cir. 2004) (finding that the *McDonnell Douglas* analysis is applicable to both a plaintiff's Title VII and ADEA claims).

In order to survive summary judgment on his hostile work environment claim, Plaintiff must first establish, pursuant to the *McDonnell Douglas* burden-shifting analysis, that he has a *prima facie* claim.[19]

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[18]Under the McDonnell Douglas framework, Plaintiff must first establish a *prima facie* case of discrimination. Should he satisfy his burden, a presumption of discrimination arises and the burden shifts to Defendant to articulate a legitimate, non-discriminatory explanation. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981). If Defendant meets this burden of production, the presumption created by the *prima facie* case is erased and the burden shifts back to Plaintiff to prove that Defendant's asserted reason was pretextual and the true reason was intentional discrimination by Defendant. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511 (1993). Therefore, although the evidentiary burden shifts back and forth, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the Plaintiff remains at all times with the Plaintiff." *Burdine*, 450 U.S. at 253.

[19] As the Supreme Court has clarified, Title VII is "not limited to 'economic' or 'tangible' discrimination." *Meritor SavingsBank, FSB v.*

Therefore, he must prove, by a preponderance of the evidence that (1) he was within a protected group; (2) he was harassed based on his membership in the protected group; (2) the harassment had the effect of unreasonably interfering with his work, creating an environment that was both objectively and subjectively hostile or offensive; and (4) he has some basis for imputing liability to his employer.[20] *Burns v. AAF-McQuay, Inc.*, F. 3d 292, 294 (4th Cir. 1999); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F. 3d 180, 190 (4th Cir. 2004) (internal citation omitted).

Vinson, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707(1978). "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.*

[20] In determining whether a work environment is hostile or offensive, a court must consider the frequency of the discriminatory conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance. *Harris v. Forklift System's Inc.*, 510 U.S. 17, 23, (1993).

Although Plaintiff contends that Mr. Jenkins and Ms. Tiner subjected him to a hostile work environment by engaging in the multiple acts listed in his EEO complaints. Plaintiff has failed to establish a prima facie case of hostile work environment. Specifically, Plaintiff has failed to demonstrate that any of the alleged harassment was based on his membership in a protected group, or that he was the victim of severe or pervasive harassment. *See Harris v. Forklift Sys.*, 510 U.S. 17, 24 (1993) (explaining that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated") (internal citations omitted). Plaintiff can point to no statements or actions allegedly made by either of his supervisors which were in any way related to his race, sex, age, or EEO filings.[21] In fact, Plaintiff admitted during the OCI investigation and the MSPB hearing that he did not have any evidence to support his allegations but simply felt they were

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[21] The Court notes that a hostile work environment claim is fundamentally a sex discrimination claim. *See Lack v. Wal-Mart Stores, Inc.*, 240 F. 3d 255, 261 (4th Cir. 2001).

true.[22] However, a subjective belief does not establish a *prima facie* claim of discrimination to create a genuine issue of material fact for trial. *See Evans v. Technologies Applications and Serv. Co.*, 80 F. 3d 954, 960 (4th Cir. 1996) (finding that "[w]hile a Title VII plaintiff may present direct or indirect evidence to support her claim of discrimination, unsupported speculation is insufficient"); *see also Goldberg*, 836 F. 2d 845 at 848.

Plaintiff also contends that he was the victim of disparate treatment. To establish a *prima facie* case of disparate treatment, an employee must show that (1) he is a member of a protected group; (2) he was subject to an adverse employment action; and (3) other similarly situated employees outside of his protected group were treated differently. *See Cook v. CSX Transportation Corp.*, 988 F. 2d 507, 511 (4th Cir. 1993). Disparate treatment is considered to be the most easily understood type of discrimination because the employer simply treats some employees less favorably than others because of their

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[22] The EEOC ALJ who reviewed Plaintiff's case, including each of his specific allegations against Ms. Tiner and Mr. Jenkins, also determined that Plaintiff could not provide any evidence to support his claims of discrimination, and that the record was devoid of any evidence to support them.

race, color, religion, national origin, sex, religion, disability age, or reprisal for prior EEO activity. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

By virtue of his identity as a fifty-three year old, African-American male, Plaintiff has demonstrated that he is a member of protected groups. However, he has not shown that he was treated less favorably than other similarly situated employees outside his protected groups.[23] He merely claims that he was subject to

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[23] The Court also notes that Plaintiff's transfer to the Logistics Team, his lowered performance rating, and the warning letter do not qualify as "adverse actions" because they did not affect the terms, conditions, or benefits or Plaintiff's employment. See James v. Booz-Allen & Hamilton, Inc. 368 F. 3d 371, 376 (4th Cir. 2004) (finding that "[a]n adverse employment action is a discriminatory act which adversely affect[s] the terms, conditions, or benefits of a plaintiff's employment"). A reassignment, for example, "can only form the basis of a valid Title VII claim if the plaintiff can show that the responsibility had some significant detrimental effect." Id. (quoting *Boone v. Goldin*, 178 F. 3d 253, 256 (4th Cir. 1999). "Absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action..." *Id.*

disparate treatment because his supervisors allegedly thought less of him because he did not attend social events, he was transferred to the Logistics Team, he received a low performance rating, and he was issued a warning letter concerning his behavior. He has not identified any employee outside of his protect groups who was treated differently, let alone an employee who was also similarly situated in all material aspects.[24] Therefore, he has not established a *prima facie* case of disparate treatment, a conclusion that was also reached by the EEOC ALJ and the MSPB ALJ.

Even assuming Plaintiff could establish a *prima facie* case of discrimination or retaliation, he has failed to rebut Defendant's contention that his removal was the result of a legitimate, non-discriminatory reason. Specifically, Defendant has come forward and explained that the decision to remove Plaintiff was made in response to his increasingly erratic

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[24] In order for two or more employees to be considered similarly situated for the purpose of creating an inference of disparate treatment, a plaintiff must show that all the relevant aspects of his employment situation are nearly identical to those of the employee he alleges was treated differently. *Mitchell v. Toledo Hospital*, 964 F. 2d 577, 583 (6th Cir. 1992).

and disturbing behavior, which Defendant felt was creating a disruptive, hostile work environment for other employees. This proffered legitimate, non-discriminatory reason for removing Plaintiff is fully supported by the MSPB decision, the EEOC decision, and the administrative record. Also, Defendant has proffered an extensive record showing not only that Plaintiff's allegations were taken seriously and fully investigated, but that Defendant's problems with Plaintiff continued despite the best efforts of his supervisors to contain and resolve them. Plaintiff was transferred to a new team, for example, in an attempt to remedy his problems with his coworkers. However, these problems persisted, simply with different coworkers and supervisors as the target of Plaintiff's unsubstantiated allegations. His disruptive behavior came to a head when he went to the Center to complain about Ms. Larry's alleged tampering with his mail, an incident which his supervisors felt warranted decisive action because of its impact on the credibility of the entire office.

There is no question that this legitimate, non-discriminatory reason for Plaintiff's removal has been stated with sufficient clarity to afford Plaintiff a realistic opportunity to show that it is a pretext for

intentional discrimination. *Burdine*, 450 U.S. at 255-56(1981). However, Plaintiff has provided no such evidence. He merely offers his subjective belief that Defendant was driven by a discriminatory motive in its decisions regarding his employment and eventual removal. In fact, in opposing Defendant's motion, Plaintiff points out that he "has sworn to his belief that his claims were made in good faith," and that Mr. Rocha felt Plaintiff truly believed his claims of discrimination and retaliation." He clearly states that he "subjectively and in good faith believed that his employer was engaging in discriminatory practices against him" because of his race, sex, age, and EEO filings. But a subjective belief is not enough to raise a genuine issue for trial, and Plaintiff's mere status as a fifty-three year old, African-American man will not suffice to carry his claims past summary judgment in the absence of any showing of discriminatory intent or effect.

Moreover, not only is a subjective belief an insufficient defense to a summary judgment motion, but in this case, that subjective belief is refuted by the undisputed record evidence showing that Plaintiff was becoming increasingly disruptive in his behavior and his supervisors belief they had no other choice but to remove him. *See*

Smith v. Flax, 618 F. 2d 1062, 1067 (4th Cir. 1980) (explaining "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff").

CONCLUSION

Because Plaintiff cannot establish a *prima facie* case on his claims of hostile work environment, disparate treatment, or retaliation, and because no question of material fact has been presented, the Court finds that Defendant is entitled to summary judgment on all of Plaintiff's claims. The Court further notes that Defendant's rationale for removing Plaintiff is fully supported by the MSPB decision, and Plaintiff has not shown that it was arbitrary and capricious. Obtained without procedures required by law, or unsupported by substantial evidence. Accordingly, Defendant's Motion for Summary Judgment is GRANTED. This matter is dismissed in its entirety.

SO ORDERED.

This the 31st day of March, 2006.

/s/TERRENCE W. BOYLE
United States District Judge

Appendix C

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Raleigh Area Office
1309 Annapolis Drive
Raleigh, NC 27608-2129
(919) 856-4065
TTY (919) 856-4296
FAX (919) 856-4151

IN THE MATTER OF:

Richard Varn,
Complainant

v.

R.L. Brownlee,
Acting Secretary
Department of the Army,
Agency.

EEOC No. 140-2003-08191x
Agency No. ARJDHQOSA02OCT0051

DECISION

Introduction

The above-captioned complaint was decided without a hearing by Regina Newell Stephens, Administrative Judge, Equal Employment Opportunity Commission.[1] The complainant alleges that he was discriminated against because of race (black), sex (male) and age (49) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, *et seq.* and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 *et seq.* Based on the totality of the evidence, and in the light most favorable to the complainant, the complainant does not prove that he was discriminated against, as alleged.

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[1] The Regulations governing federal sector EEO complaints provide for the issuance of summary judgment upon the motion of the Administrative Judge, after notice to the parties, that there is no genuine issue of material fact or credibility. 29 C.F.R. Section 1614.109(g)(3).

Issue Presented

The issue presented herein is whether the complainant was discriminated against because of his race (black), sex (male), and age (49) when he was subjected to a hostile work environment when the following occurred:

1. On July 17 and 19, 2002, his supervisor, William Jenkins, telephone the hotel in Mexico/Barbados seeking information concerning what the aggrieved was doing at the resort.

2. In June 2002, supervisor Jenkins provided negative information to an investigator concerning the complainant's character.

3. Supervisor Jenkins consistently spoke negatively to command personnel, hotel personnel and audit staff member regarding the aggrieved's inability to remember directions to the job sites and auditing materials.

4. Supervisor Jenkins failed to take action against a co-worker that was harassing the complainant.

5. Supervisor Jenkins told the aggrieved to work on a compressed day off, April 19, 2002.

6. On June 13, 2002, supervisor Jenkins refused to give a time of departure to the aggrieved from the TDY site in Atlanta, Georgia.

7. Supervisor Jenkins contacted BB&T about the complainant's current car loan payment.

8. Supervisor Jenkins riffled and searched the complainant's desk and went through the complainant's personal carrying case to obtain personal information about the complainant.

9. Supervisors Jenkins and Belinda Tiner degraded the complainant in front of the audit staff and command personnel.

10. Supervisors Jenkins and Tiner spoke to the complainant's neighbor regarding an event that happened in the neighborhood.

11. Supervisor Tiner assigns administrative duties to the complainant and

does not give the complainant an opportunity to excel in Army auditing. Supervisor Tiner refused to allow the complainant to go TDY or be involved in key meetings and presentations of audit results.

12. The complainant has not received any type of award.

13. Complainant received a "Needs Improvement" rating on his performance appraisal for the period ending November 1, 2002, and a Letter of Warning. Complainant based these issues on reprisal.

14. Complainant was placed on administrative leave effective February 4, 2003, as an act of reprisal for previous EEO participation.

Procedural Background

The following is a chronology of the events which have transpired and led up to this hearing: EEO counseling was sought by the complainant on August 8, 2002. EEO counseling was conducted and a notice of right to file was provided to the complainant on September 10, 2002. The complainant filed a formal complaint on September 14,

2002. The investigation by the agency was completed and copies of the investigation provided to the parties. The complainant requested a hearing before an Administrative Judge by document dated March 4, 2003. By motion, the agency advised the Administrative Judge that the complainant had filed a claim, regarding his removal, with the Merit Systems Protection Board and believed the appeal included the issues before the EEOC. After a review of complainant's appeal to the MSPB, the complainant's EEO complaint was dismissed as being the same claim before MSPB – October 9, 2003, However, thereafter, by decision dated November 24, 2003, the MSPB refused to hear complainant's claims that related to discrimination. The matter was returned to the EEOC and returned to the hearing docket. Thereafter, by notice dated January 5, 2004, the Administrative Judge noticed the parties of her intend to issue a decision without a hearing.

Factual Background[23]

[2] The following is a synopsis of the evidence contained in the investigative report. In reaching the decision, all evidence was reviewed and considered whether or not specifically mentioned.

At the time of his complaint, the complainant was employed by the agency as an auditor, GS-0511-12 at the USAAA, Fort Bragg, North Carolina. In this position, com-plainant was supervised by William Jenkins, Auditor in Charge/Audit Supervisor, GS-511-13 (Asian-American, male, date of birth: December 18, 1961) and later by Belinda Tiner, Audit Manager, GS-511-13 (white, female date of birth: September 27, 1953). Rodney Rocha (Hispanic, male, date of birth: September 4, 1946) was the complainant supervisor as the Audit Manager, GS-511-14.

In his complaint, the complainant alleges that he was discriminated against because of his race (black), sex (male), and age (49) when the following occurred:

1. On July 17 and 19, 2002, his supervisor, William Jenkins, telephoned the hotel in Mexico/Barbados seeking information concerning what the complainant was doing at the resort.

In response, supervisor Jenkins denies calling any place to determine what the

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[3] Hereinafter, the following abbreviations are applicable: Exh (Exhibit), and IR (Investigative Record).

complainant was doing on his vacation. Complainant does not provide nor does the investigative record contain any supportive documentation.

2. In June 2002, supervisor Jenkins provided negative information to an investigator concerning the complainant's character.

Supervisor Jenkins denies providing any negative information about the complainant to anyone. Complainant does not provide nor does the investigative record contain any supportive documentation.

3. Supervisor Jenkins consistently spoke negatively to command personnel, hotel personnel and audit staff member regarding the aggrieved's inability to remember directions to the job sites and auditing materials.

Supervisor Jenkins denies providing any negative information about the complainant to anyone. Complainant does not provide nor does the investigative record contain any supportive documentation.

4. Supervisor Jenkins failed to take action against a co-worker that was harassing the complainant.

Here, complainant alleges that a coworker, Anita Paul (white, female, date of birth: January 11, 1965) was disrespectful towards him and "mocked" him. He reported the same to supervisor Jenkins, who in turn, counseled employee Paul about the assertions. He testified that after his investigation, he concluded the employee Paul did not intentionally act in a manner to mock the complainant but that he warned her about considering other people's perceptions of her actions.

5. Supervisor Jenkins told the aggrieved to work on a compressed day off April 19, 2002.

Supervisor Jenkins denies asking the complainant to work on his compressed day off – April 19, 2002. Complainant does not provide nor does the investigative record contain any supportive documentation.

6. On June 13, 2002, supervisor Jenkins refused to give a time of departure to the complainant from the TDY site in Atlanta, Georgia.

Supervisor Jenkins responded that during this trip, he advised the complainant that they would leave the site "late" but that he did not have the exact time. Complainant does not provide nor does the investigative record contain any supportive documentation.

7. Supervisor Jenkins contacted BB&T about the complainant's current car loan payment.

Supervisor Jenkins denied calling BB&T or any bank regarding the complainant's loan payment. Complainant does not provide nor does the investigative record contain any supportive documentation.

8. Supervisor Jenkins riffled and searched the complainant's desk and went through the complainant's personal carrying case to obtain personal information about the complainant.

In response, supervisor Jenkins denied that he searched complainant's desk in any way at any time. Complainant does not provide nor does the investigative record contain any supportive documentation.

9. Supervisors Jenkins and Belinda Tiner degraded the complainant in front of the audit staff and command personnel.

In that regard, denies ever degrading complainant in front of the audit staff. Supervisor Tiner corroborated his statement. Complainant does not provide nor does the investigative record contain any supportive documentation.

10. Supervisors Jenkins and Tiner spoke to the complainant's neighbor regarding an event that happened in the neighborhood.

Supervisor Jenkins denies knowing complainant's neighbors or contacting them about anything. Supervisor Tiner corroborated his statement. Complainant does not provide nor does the investigative record contain any supportive documentation.

11. Supervisor Tiner assigns administrative duties to the complainant and does not give the complainant an opportunity to excel in Army auditing. Supervisor Tiner refused to allow the complainant to go TDY or be involved in key meetings and presentations of audit results.

Supervisor Jenkins stated that complainant and the "rest of the staff" went TDY November 2001 through April 2002. Supervisor Tiner corroborated this statement. Complainant does not provide nor does the investigative record contain any supportive documentation.

12. The complainant has not received any type of award.

In response, supervisor Jenkins states that the complainant "has been put in for an award" during the years he supervised complainant. Specifically, he testified that he recommends an employee for an award who has exceeded each of their five performance objectives. He has not found that to be the situation with complainant. Further, the record provides that Supervisor Tiner has the final authority on who receives a performance award. She stated that complainant has not received a performance award because he has not been recommended for one by any of his raters.

13. Complainant received a "Needs Improvement" rating on his performance appraisal for the period ending November 1,

2002, and a Letter of Warning. Complainant based these issues on reprisal.[4] A review of the record provides that complainant was given the letter of warning because his behavior "is causing a disruption in the workplace. Rodney Rocha, Audit Manager, advised complainant that he could not allow the complainant's conduct to continue due to impact on other workers and complainant's ability to perform the duties of his position. Thereafter, in December 2002, the complainant was issued a letter of warning based on his unsubstantiated allegations against numerous employees and his continuous disruption in the workplace. In the letter, the agency advised the complainant that his behavior also negatively affected his work product. The complainant was advised to seek the assistance of the Employee Assistance Program (EAP) or private assistance.

14. Complainant was placed on administrative leave effective February 4,

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[4] Complainant amended his complaint by adding this issue on December 3, 2002. IR at Tab H.

2003, as an act of reprisal for previous EEO participation.[5]

The record provides that supervisor Tiner received a message that the complainant had gone to the command office and accused any agency employee (and also his neighbor) of interfering and stealing his mail. The complainant's behavior was described as "extremely upsetting" to the employee and the office. She stated that complainant's behavior was described as "strange" and "in need of a psych-eval." The agency argued that this behavior by the complainant was "more egregious" than his previous behavior because it involved military clients and brought discredit to the agency and his follow auditors.

Complainant's investigative record contains amendments (other than those listed above) to the complaint. Specifically, the complainant alleges that he was treated to disparate treatment. He asserts that the agency frowns upon employees who do not participate in social events, such as holiday parties, etc. Like the previous allegations, there is no proffered evidence to support this

[5] Complainant amended his complaint by adding this issue on March 4, 2003. IR at tabs F and G.

allegation. In response, the agency denied the claim.

In addition, the complainant alleges that in March 2001, he was transferred from the AMI team to the AML team due to a disagreement he had with two white female employees regarding annual leave. The agency, through the testimony of complainant's fourth level supervisor, was reassigned because of the problems between complainant and the other members of the team. He notes that several of the team members requested to transfer out of the unit if complainant remained. Further, he asserts that supervisor Johnson tried to get him to sign a voluntary transfer agreement but he refused. In response, supervisor Jenkins indicated that he was providing complainant with the necessary administrative matters as was his responsibility. He stated that complainant was provided a standard form to sign before a transfer takes place. He stated that his actions were not based on the alleged discriminatory reasons.

It is noteworthy that complainant's co-workers testified that they did not believe the complainant was discriminated against by supervisors Jenkins and Tiner. In fact, both supervisors are described as fair. One

co-worker asserted that she believed the complainant was under a lot of stress due to his wife's illness. In addition, the complainant was described, by his coworkers, as "intolerable" and "a different person after [holidays]." Further, there was a remark that complainant was "sick and needed help.

***

It documentation provided subsequent to the hearing request, the complainant reiterates his belief that he is a victim of discrimination based on his race, sex, and age.

Analysis and Findings

In any proceeding, either administrative or judicial, administrative an allegation of employment discrimination, it is the burden of the complainant, to initially establish that there is some substance to his or her allegation. In order to accomplish this burden, the complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This means that the com-plainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that

discrimination did occur. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory explanation for its action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In this regard, the agency need only produce evidence sufficient "to allow the trier of fact rationally to conclude" that the agency's action was not based on unlawful discrimination. Once the agency has articulated such a reason, the question becomes whether the proffered explanation was the true reason for the agency's action or merely pretexts for discrimination. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993). Although the burden of production may shift, the burden of persuasion, by a preponderance of the evidence, remains at all times on the complainant. *Burdine,* at 256.

Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably because of their race, color, national origin, sex, religion, disability, age, or reprisal for prior EEO activity. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

To establish a *prima facie* case of discrimination based on race, sex, and age, the complainant must establish that he is in a protected group, and was treated less favorably than other similarly situated employees outside his protected group. *See Potter v. Goodwill Industries of Cleveland,* 518 F. 2d 864, 865 (6th Cir. 1975). While comparative evidence is usually used to establish disparate treatment, the complainant need only set forth some evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978).

Here, by virtue of his race (black), sex (male) and age (49), the complainant demonstrates that he is a member of the protected groups: He does not show, however, that he was treated less favorably than similarly situated employees outside his protected group. In order for two or more employees to be considered similarly situated for the purpose of creating an inference if disparate treatment, a complainant must show that all the relevant aspects of his employment situation are nearly identical to those of the employee whom he alleges was treated differently. *Smith v. Monsanto Chemical Co.*, 770 F. 2d 719, 723 (8th Cir. 1985). The Commission

has ruled that in order to be considered similarly situated, comparative employees must *inter alia*, have performed the same job function and come under the same manager's supervision. *Jones v. United States Postal Service*, EEOC Request No. 05990092 (May 30, 2001). Further, the complainant does not proffer sufficient evidence to support an inference of discrimination based on race, sex, and age.

As to reprisal, and in accordance with the burdens set forth in *McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F. 2d 222 (1st Cir. 1976), and *Coffman v. Department of Veteran Affairs*, EEOC Request No. 05960473 (November 20, 1997), a complainant may establish a *prima facie* case of reprisal by showing that (1) he engaged in a protected activity, (2) the agency was aware of the protected activity, (3) subsequently, he was subjected to adverse treatment by the agency, (4) a nexus exists between the protected activity and the adverse treatment, *Whitmire v. Department of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000). Here, the complainant proffers sufficient evidence to support a *prima facie* case of discrimination

based on reprisal with regard to issues 13-14.

The burden shifts to the agency to articulate legitimate non-discriminatory reasons for its actions. To that end, the agency denies subjecting the complainant to retaliation regarding issues 13 and 14. As to issue 13 and 14, the agency presents evidence that the complainant was given a letter of warning, because of his disruptive behavior. The agency's burden is met.

In order to prevail the complainant must now show the agency's actions are pretext designed to cover up or mask discrimination. That is, the complainant must demonstrate that the agency's reasons are unworthy of belief or motivated by discriminatory motives. To that end, the complainant does not proffer any evidence to support a finding of pretexts.

Conclusion

Based on the aforementioned reasons, the complainant does not prove, by a preponderance of the evidence, that he was discriminated against, as alleged.

Notice

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 64 Fed. Reg. 37,644 37,657 (1999) (to be codified as C.F.R. Section 1614.109(b), 109(g) or 109(i). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency

must also simultaneously file an appeal to the Commission in accordance with 64 Fed. Reg. 37,644, 37, 659 (1999) (to be codified as 29 C.F.R. Section 1614.403), and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has not issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity
Commission
P.O. Box 19848, Washington, D.C. 20036
Fax No. (202) 663-7022

Facsimile transmission over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. *See* 29 C.F.R. Section 1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of

its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

SO ORDERED.

/s/Regina Newell Stephens
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2004, I have served the attached document on the following by United States Mail on the following persons:

Richard Varn
1717 Calista Circle
Fayetteville, NC 28304

Raymond V. O'Connor, Jr.
3101 Park Center Drive
Alexandria, VA 22302-1596

Director, EEOCCRA
Attn: SFMR-RBE
1941 Jefferson Davis Highway
Crystal Mall 4
Arlington, VA 22202-4508

/s/ Regina Newell Stephens
Administrative Judge

Appendix D

UNITED STATES OF AMERICA
MERIT SYSTEMS
PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
DC-0752-03-0756-I-1

DATE: November 24, 2003

RICHARD VARN,
Appellant

v.

DEPARTMENT OF THE ARMY,
Agency.

Richard Varn,
Fayetteville, North Carolina, pro se.

Raymond V. O'Connor, Jr., Esquire,
Alexandria, Virginia, for he agency.

BEFORE
Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

On August 28, 2003, the appellant filed an appeal from an agency decision to remove him from the position of Auditor, GS-0511-12, U.S. Army Audit Agency, Fort Bragg, North Carolina. The Board has jurisdiction over the appeal. 5 U.S.C. Sections 7511(a)(1)(A), 7512(1), 7513(d). For the following reasons, the agency action is AFFIRMED.

Background

In the Auditor position, the appellant was supervised by William Jenkins, Audit Supervisor (first level supervisor), and Rodney F. Rocha, Audit Manager (second level supervisor). On December 2, 2002, Mr. Rocha issued the appellant a nondisciplinary letter of warning. Appeal file (AF) tab 3, subtab 4T. Mr. Rocha stated that the appellant's behavior was causing a disruption in the workplace that could not be allowed to continue. Specifically, the appellant had made unsubstantiated allegations about Mr. Jenkins, Brenda Tiner, Audit Manager, Anita Paul, Auditor, and Diana Hartledge, Auditor. They were (1) Mr. Jenkins and Ms. Tiner called the appellant's minister to inform him of the

appellant's actions while at work; (2) Mr. Jenkins, Ms. Tiner, and Ms. Hartledge contacted the appellant's neighbor to say negative things about him; (3) Mr. Jenkins called the appellant's bank and inquired about the details of a loan he arranged for the purchase of an automobile: (4) Mr. Jenkins contacted a prospective employer before the appellant's job interview to provide negative comments about his performance and abilities; (5) Mr. Jenkins called a hotel where the appellant was staying while out of the country on vacation in an attempt to harass him; (6) Ms. Hartledge drove by his home late a night, provided negative comments to command about him, and placed nails under his tires; and (7) Ms. Paul mocked him while at the office and while on TDY (temporary duty) locations. In addition, Mr. Rocha noted that the appellant reacted to being told to attend a training session at the Fort Bragg Field Office and to a discussion with Ted McNeill, Audit Supervisor, over the use of the Field Office GSA (General Services Administration) car with vocal outbursts that were alarming to other employees and by indicating that Ms. Tiner was attempting to harass him. Finally, Mr. Rocha stated that the appellant's behavior was affecting his performance as shown by a rating of "needs improvement" for the period ending October

31, 2002. Mr. Rocha urged the appellant to seek assistance from the Employee Assistance Program (EAP) and invited him to provide medical evidence of any medical condition that might be affecting his performance or conduct. The appellant was placed under the direct supervision of Mr. Rocha.

By notice dated July 1, 2003, Mr. Rocha proposed the appellant's removal for "conduct unbecoming a Federal employee." AF tab 3, subtab 4E. The proposal was based on the incidents described in the letter of warning (specification 1), and on an incident that occurred on February 3, 2003, (specification 2).[1] The agency charged that on February 3, 2003, the appellant went to the offices of the 2nd Battalion, 1st Special Warfare Training Group, JFK Special Warfare Center and School, to complain that a civilian employee of that office who was also his next-door neighbor (Carmel Larry) had tampered with his mail. He made the same allegation later in the day in a telephone call of the office. The appellant made oral and written replies to the proposal

[1] Because the letter of warning was nondisciplinary when it was issued, the agency has not disciplined the appellant twice for the same misconduct. See, e.g., *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993).

notice. AF tab 3, subtabs, 4C, 4D. On August 25, 2003, James M. Andrews, Program Director, Supply, issued a decision to remove the appellant based on both specifications. The appellant was removed on August 29, 2003. AF tab 3, subtab 4A.

Legal standard

The agency must prove the charge contained in the proposal notice by a preponderance of the evidence. 5 U.S.C. Section 7701(c); 5 C.F.R. Section 1201.56(a)(1). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested facts is more likely to be true than untrue. 5 C.F.R. Section 1201.56(c)(2). The agency also must demonstrate that disciplinary action will promote the efficiency of the service, see *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 73-74(1987), and that the penalty imposed was reasonable, see *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

The charge is sustained

Conduct unbecoming is a general charge containing no specific element of intent although intent may be relevant to the penalty determination. *Fernandez v. Department of Agriculture*, 95 M.S.P.R. 63, 67 (2003); *Cross v. Department of the Army*, 89 M.S.P.R. 62, 68-69 (2001). It may be sustained when the Board finds that the appellant engaged in inappropriate behavior, however, the penalty should reflect only the proven level of impropriety, *Russo v. U.S. Postal Service*, 284 F. 3d 1304.1309-10 & n.2 (Fed. Cir. 2002).

Specification 1 – Agency evidence to support the alleged unsubstantiated allegations about co-workers includes the sworn statements of Jenkins, Tiner, Hartledge and Paul (AF tab 3, subtabs 4G, 4H, 4I and 4L), and the testimony of Jenkins Tiner, and Hartledge. The statements and testimony were consistent and the witnesses corroborated one another. *See also* AF tab 12, subtabs, U, V, XYZ. I found the statements and testimony of the agency witnesses credible. Many of the "unsubstantiated allegations" described in the letter of warning were also made by the appellant in a discrimination complaint he filed (and

amended) between September 20, 2002, and February 10, 2003. AF tab 7, attachment 1. In his testimony, the appellant admitted making all the allegations except (4) and the portion of (6) that states Ms. Hartledge drove by his home late at night and provided negative comments to command about him. He also admitted he made the allegations identified in his discrimination complaint. Finally, he admitted that he did not have evidence to support his allegations when he made them but he felt they were true. Base on the agency evidence and the appellant's admissions, I conclude that this portion of specification 1 is sustained.

Agency evidence to support the next portion of specification 1 includes the sworn statement and testimony of Ted McNeill, Audit supervisor. AF tab 3, subtab 4O. Mr. McNeill testified that a GSA car became available and he asked the appellant if he wanted to use it. The appellant replied that he and Ms. Tiner disagreed over the use of the vehicle and he refused to use it. Mr. McNeill told him he could not refuse. The appellant became very agitated during the discussion. He stood up and raised his voice in a confrontational manner. Mr. McNeill testified that he was aware that the appellant was already very upset about the cancellation of temporary duty and had

threatened to take the matter to the Secretary of the Army. When he saw the appellant go to his car, he felt afraid and decided to dismiss the employees for the rest of the day for their safety. *See also* AF tab 7, attachment 1 and 18. The appellant denied that he was disruptive when Mr. McNeill spoke to his about use of the GSA car. He just told him he would rather not use it. Around 2:30 p.m. he noticed that staff were leaving the building. He remained on duty until 4:30 p.m. when he secured the building and went home. I find Mr. McNeill's sworn statement and testimony more credible than the appellant's denial. Mr. McNeill provided a detailed explanation of the incident and the appellant simply denied that anything occurred. And, if nothing occurred, I find it inherently implausible that the appellant noticed the staff leaving the building but never asked the reason. This portion of specification 1 is sustained.

In her sworn statement, Vanessa Lee, Auditor, recalled the incident where the appellant's schedule was changed and he was instructed to attend training. AF tab 3, and subtab 4F. She stated that the appellant was "very upset" to the extent that she reported the incident to Mr. Jenkins. In his testimony, the appellant admitted that he was upset about the schedule change, and he

expressed his concern to Ms. Lee. Affidavits that are not rebutted constitute evidence of matters asserted therein, and, if uncontested, such affidavits prove the facts they assert. *Schaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989). Based on Ms. Lee's affidavit, the appellant's admission that he was upset, and the similarity between this incident and the previous one, this portion of the specification is sustained.

Specification 2 – Agency evidence to support this specification includes the sworn statements of Major John E.B. Stewart, Carmel Larry, and Lieutenant Colonel Sean P. Mulholland, the unsworn memorandum and testimony of Ms. Tiner. AF tab 3, subtabs 4P, 4Q, 4R, 4S. The evidence describes the appellant's visit and later telephone call to Ms. Larry's workplace to complain to Ms. Larry's supervisors that she had tampered with his mail. The appellant testified that he found mail addressed to another neighbor in his mailbox (apparently in January) and he placed it in the correct mailbox. The next morning he discovered mail addressed to him in his mailbox that had not been there the night before, and he concluded Ms. Larry had placed it there. He admitted that he visited and later called Ms. Larry's workplace alleging that she had tampered with his mail. He could not

explain to me why he considered Ms. Larry's actions to be tampering when he had taken essentially the same action with another neighbor's mail himself. The appellant testified that his family and the Larry's have had problems in the past. He appeared to believe now that it was a mistake to go to Ms. Larry's workplace. Based on the agency evidence the appellant's admission, specification 2 is sustained.

Based on the sustained specifications, the charge of conduct unbecoming a Federal employee is sustained.

Race, color, and sex discrimination based on disparate treatment – an employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997).

The Appellant did not identify any similarly situated individuals not members of his protected group who were treated less harshly than he was. Accordingly, he failed to meet his burden of proving a prima facie case of discrimination based on race, color, or sex.

Reprisal

For an appellant to prevail on a contention of illegal retaliation, he has the burden of showing that: (1) He engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Redschlag v. Department of the Army,* 89 M.S.P.R. 589, 623-24 (2001), *review dismissed,* 32 Fed. Appx. 543 (Fed. Cir. 2002), citing, *Warren v. Department of the Army*, 804 F. 2d 654, 656-58 (Fed. Cir. 1986). The appellant alleges that he engaged in protected activity by filing a discrimination complaint on September 20, 2002. Messrs. Rocha and Andrews, the proposing and deciding officials, knew of the complaint and testified during the fact-finding state of the investigation. The fact-

finding report was issued on May 6, 2003. AF tab 7, attachment 1. Because the appellant's removal was proposed shortly thereafter on July 1, 2003, the removal action could have been retaliation for filing the complaint.

The appellant's complaint primarily alleged discrimination and harassment by Ms. Tiner and Mr. Jenkins. Mr. Rocha was interviewed about incidents that allegedly occurred after July 30, 2002, when he became the appellant's supervisor. The fact-finding report does not appear to mention Mr. Andrews. The outcome of the complaint is unclear, but absent evidence that the complaint was resolved in the appellant's favor, Mr. Rocha had only a slight motive to retaliate against the appellant for this complaint and Mr. Andrews had none. See *Redschlag v. Department of the Army*, 89 M.S..R. at 626.

Next, the gravity of the misconduct as it appeared to Mr. Rocha at the time he proposed removal must be assessed. *Redschlag v. Department of the Army*, 89 M.S.P.R. at 626. The appellant had been giving a nondisciplinary letter of warning informing him that his unsubstantiated allegations about other employees could not

be condoned and if his behavior did not improve corrective action would be taken. Then, appellant embarrassed the office by making another unsubstantiated allegation that his neighbor was tampering with his mail. Mr. Rocha testified that he had spent hours trying to correct the situation by talking to the appellant, but it was getting worse and he no longer believed he could guarantee the appellant's conduct. Under these circumstances, the decision to propose the appellant's removal was a responsible management action. For this reason and because I have found that Mr. Rocha had a sound basis for proposing the action, I conclude that the appellant has not established a nexus between Mr. Rocha's slight motive to retaliate and the proposed removal. If I had found such a nexus, I still would not find that the removal action was reprisal because the appellant has not established any motive to retaliate by Mr. Andrews and Andrews issued the decision to remove.

<u>The agency is not required to file a disability retirement application.</u>

The appellant is covered by the Civil Service Retirement System (CSRS). An agency must file a disability retirement

application for a CSRS employee who has 5 years of civilian Federal Service when all of the following conditions are met: (1) The agency has issued a decision to remove the employee; (2) The agency concludes, after its review of medical documentation, that the cause for unacceptable performance, attendance, or conduct is disease or injury; (3) The employee is institutionalized, or the agency concludes, based on a review of medical or other information, that the employee is incapable of making a decision to file an application for disability retirement; (4) The employee has no personal representative or guardian; and (5) The employee has no immediate family member who is willing to file an application on his behalf. 5 U.S.C. Section 8337(a); 5 C.F.R. Section 831.1205(a);*Timberlake v. U.S. Postal Service*, 94 M.S.P.R. 231, 234 (2003).

In this case, the appellant has 5 years of civilian Federal service and the agency has issued a decision to remove him. Although the agency asked the appellant to provide medical evidence of any condition that might be affecting his performance or conduct, none was provided. *See, e.g.*, AF tab 3, subtabs 4E, 4T. At his oral reply, the appellant said that he had been evaluated by a psychologist at NC Baptist Hospital and

found to be "normal." He declined to provide a copy of the evaluation report. AF tab 3, subtab 4C at 4. Thus the agency had no medical documentation and still has no medical documentation upon which it could base a conclusion that that the cause for the appellant's conduct was disease or injury. The appellant is not institutionalized or otherwise shown to be incapable of making a decision to file for disability retirement. And while he does not have a personal representative or guardian, the appellant is married with at least two children, one of whom accompanied him to the oral reply. AF tab 3, subtab 4C at 1. I find that most of the criteria for an agency-filed application for the appellant's disability retirement are not met. Therefore, the agency was not required to file.

Reasonableness of the penalty

When the Board sustains all of any agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, 178 F. 3d 1246, 1260 (Fed. Cir. 1999). In making this determination, the Board must give due weight to the agency's primary discretion in

maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised. *Lazenby v. Department of the Air Force*, 66 M.S.P.R. 514, 520 (1995), citing, *Douglas v. Veterans Administration*, 5 M.S.P.R. at 306.

Mr. Andrews, the deciding official, testified that the most important factors in his penalty determination were: (1) The appellant's conduct had disrupted his relationships with other auditors and with clients and he did not believe that was likely to change; (2) Employees have told him they are afraid of the appellant, (3) With the complaint about mail tampering, appellant's conduct spread outside the workplace,; and (4) He did not believe the appellant would be able to efficiently and effectively conduct audits. Based on his written decision and his testimony, I find that Mr. Andrews considered relevant mitigating and aggravating factors.

In evaluating a penalty determination, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and

responsibilities including whether the offenses were intentional or were frequently repeated. *Hernandez v. Department of Agriculture,* 83 M.S.P.R. 371, 374 (1999). In this case, the appellant's conduct was serious and repeated. It adversely affected his ability to work with supervisors and co-workers and diminished the agency's trust and confidence that he could perform auditor duties. While the appellant has over 20 years of Federal service, normally a significant mitigating factor, he has less than 10 years of service with this agency. The agency did not rely on any past disciplinary record, but it is significant to appellant's rehabilitative potential that he was warned about his conduct. The specifications in this case describe numerous incidents of the appellant's unprofessional and inappropriate conduct toward supervisors and co-workers and eventually another office during a period of more than a year. For these reasons, I conclude that the agency has demonstrated that the removal penalty was reasonable. *See, e.g., KIrkland-Zuck v. Department of Housing and Urban Development*, 90 M.S.P.R. 12, 19-20 (2001).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/Elizabeth B. Bogle
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. Section 1201. 112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on December 29, 2003, unless a petition for review if filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or

the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable law, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.R.F. Section 1201.5(f) which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. Section 2000e-5. If you file a civil action

with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. Section 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. Section 2000e-16(c) must be filed no later than 30 calendar days after the date of this decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. Section 633a(c). In some, but not all districts you may have up to 6 years to filed such a civil action. *See* 28 U.S.C. Section 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition

must be received by the court of appeals no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant
Richard Varn
1717 Calista Circle
Fayetteville, NC 28304

Agency's Representative
Raymond V. O'Conner, Jr.
U.S. Army Audit Agency
3101 Park Center Drive
Alexandria, VA 22302-1596

Other
Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 E Street, NW, Room 7412
Washington, DC 20415

Date: November 24, 2003

/s/Alva M. Bunaugh
Paralegal Specialist

Appendix E

October 16, 2003

Memorandum for the Record: For:
Elizabeth B. Bogle

Subject: Witnesses List for Docket Number DC-0752-03-0756-I-1

1. I am requesting the following witnesses be approved for testimony in the above matter.

Mr. Robert Stogner, Auditor-In-Change, GS-13, U.S. Army Audit Agency
Mr. James Dotson, Auditor-In-Change, GS-13, Internal Review Office, Europe
Mrs. Monique Ferrell, Audit Manager, GS-14, U.S. Army Audit Agency
Mr. William Gable, Audit Manager, GS-14, U.S. Army Audit Agency
Mr. Nelson Reyers, Senior Auditor, GS-12, Internal Review Office, Puerto Rico
Mrs. Sharon Seawright, Senior Auditor, GS-23, U.S. Army Audit Agency
Mrs. Barbara Gora, Senior Auditor, GS-12, U.S. Army Audit Agency
Ms. Heather Cain, Senior Auditor, GS-12, U.S. Army Audit Agency

Ms. Jan Cederquist, Senior Auditor, GS-12, U.S. Army Audit Agency
Ms. Kathy Cunningham, Junior Auditor, GS-11,, U.S. Army Audit Agency
Mr. Bill Jeffords, Junior Auditor, GS-9, U.S. Army Audit Agency
Ms. Ivette R. Reick, Junior Auditor, GS-9, U.S. Army Audit Agency
Mrs. Lawanda Underwood, Senior Auditor, GS-12, U.S. Army Audit Agency
Mr. Kenneth West, Senior Auditor, GS-12, U.S. Army Audit Agency
Mr. Eugene Cryer, Jr, 300 Fishburne Street, Walterboro, SC 29488, Phone Number (803) 549-6412
Mr. Anthony Hodge, Pastor, New Life United Methodist Church, Walterboro, SC 29488, Phone Number (843) 549-1254
Mr. Mckinley William, Deacon, New Life United Methodist Church, Walterboro, SC 29488, Phone Number (843) 538-3807
Ms. Sharon Lewis, 218 Ackerman Street, Walterboro, SC 29488, Phone Number (843) 549-5771
Ms. Laquesha S. Varn, 100 Flintwood Court, Winston Salem, NC 27106, Phone Number (336) 744-0049
Ms. Betty J. Tracy, 216 Ackerman Street, Walterboro, SC 29488, Phone Number (843) 549-7580

Mr. & Mrs. Larry, 1713 Çalista Circle,
Fayetteville, NC 28304
Mr. & Mrs. Pea, 1723 Calista Circle,
Fayetteville, NC 28304

/s/Richard Varn
Senior Auditor
U.S. Army Audit Agency
Home Phone (910) 426-1274

of the Army, 89 M.S.P.R. 589, 623-24 (2001), *review dismissed*, 32 Fed. Appx. 543 (Fed. Cir. 2002), citing, *Warren v. Department of the Army*, 804 F. 2d 654, 656-58 (Fed. Cir. 1986).

Rulings on Requests for Hearing Witnesses

After the discussion of the agency's proof of the specifications, I allowed the agency to amend its witness list. The following agency witnesses were approved: James M. Andrews, Richard Varn, Rodney Rocha, William E. Jenkins, Diana D. Hartlage, Belinda A. Tiner, Robert Stogner, Manuel Landron, Sean P. Mulholland, and First Sergeant Chadwick. Mr. O'Connor will confirm in this amended witness list in writing. The appellant agreed to testify first because it is unclear to me which of the agency's allegations he admits and which he denies. I did not approve any of the appellant's proposed witnesses because he was unable to state what the expected testimony of any of them would be. The appellant stated that he wanted to call the members of his office who had not given statements to contradict the testimony of

those who had but he had not spoken to these individuals and otherwise had no reason to know whether their testimony would be contradictory. The appellant objected to this ruling. I reserved ruling on proposed exhibits until the hearing.

Any exception to this summary must be filed within five days of its date.

FOR THE BOARD:

/s/Elizabeth B. Bogle
Administrative Judge

Phone: (703) 756-6250
Fax: (703) 756-7112

Appendix G

October 1, 2003

MEMORANDUM FOR Ms. Elizabeth B. Bogle, Administrative Judge, MSPB, Washington Regional Office

Subject: Request (Motion) not to consolidate My Removal case with my EEO Complaint

Docket Number
DC-0752-03-0756-1-1

Dear Ms. Bogle

1. Reference the attached letter from the U.S. Army Audit Agency regarding consolidating my removal case and EEO complaint.

2. I am making a motion that my removal case and EEO complaint be heard before the MSPB as two separate cases. I do not want the two cases consolidated as the United States Army Audit Agency representative is recommending in the attached letter. The two cases are not directly related, but separate in nature.

3. I am also requesting that you obtain all of the documentation from the Department of Defense, Office of Complaints Investigations Fact Finding Conference that was conducted on February 26-27, 2003 and March 20, 2003 from the United States Army Audit Agency representative. If the agency will not release these documents to you I have them and will be glad to provide them to you. The evidence in these files are very important to my EEO complaint.

Sincerely

/s/Richard Varn

CF: USAAA